THE BURDEN OF PROOF OF CHASTITY OF WOMAN IN PROSECUTIONS FOR SEDUCTION.

FROM a very early date the seducer was, under certain circumstances, liable for heavy damages in a civil action;[1] yet the criminality of seduction was altogether foreign to the common law.[2] Seduction as a crime is wholly a creature of statute, and, of course, each statute is sufficient unto itself in the definition of the various elements of the crime and in the determination of what must be alleged and in what manner the proof must be presented. In the last analysis the wording of the statute itself as locally construed must prevail in a given case.

Hence it might, at first glance, seem useless to cite authorities from other jurisdictions in any controversy concerning the interpretation to be given to the particular language of a given statute. Yet nothing could be further from the truth, for a survey of the American authorities clearly shows that these statutes may be marshalled under two main heads, according as they contain, or do not contain, in some form, the words, "of previously chaste character," or their substantial equivalent. Therefore, on many matters necessarily arising on the trial in a case of seduction, the decision of the courts of another jurisdiction, in the construction of a statute belonging to the same general class as the local statute under consideration, will be found to be weighty primary authority.

From a wilderness of minor matters let us select, for the purposes of this investigation, one great point necessarily arising in every trial, the fundamental point which causes prosecutions to succeed or fail: namely, the burden of proof of the chastity of the prosecutrix. It is axiomatic with all the authorities that the crime of seduction cannot be committed upon an unchaste

[1] Cooley on Torts, 260.
[2] Bishop, Statutory Crimes, 2nd ed., § 629.

woman.[3] According to numerous authorities it may, indeed, be committed upon one who has been unchaste, but who has subsequently reformed, and has thus, in law if not in fact, regained her "golden crown." [4] But the great question, upon which there is much conflict of authority, is, Upon which party shall the burden of proof be cast in regard to the immediate prior chastity of the woman who has been seduced? A very long step has been taken in the decision of any close question in law when once it has been ascertained upon which party is cast the duty of first adducing evidence and the ultimate risk of non-persuasion, for of him more and stronger evidence is required than of the other party, who may stand passive until his adversary has made out a prima facie case.

An analysis of the statutes and of the decisions construing them may be found helpful at this point.

I. Statutes Punishing Seduction of "Any Unmarried Woman."

In many of the States the statutory form is very simple. Omitting matter immaterial to the present investigation, it reads: "If any man shall seduce and debauch any unmarried woman, he shall * * *"

With regard to the burden of proof, the construction placed upon statutes of this type seems to have been uniform throughout the United States. In these cases the prosecution is not required even to aver in the indictment the prior chastity of the woman,[5] and may safely go to trial without, in the first instance,

[3] Zabriskie *v.* State, 43 N. J. L. (14 Vroom) 640, 39 Am. Rep. 610; Norton *v.* State, 72 Miss. 118, 16 South. 264, 18 South. 916; Walton *v.* State, 71 Ark. 398, 75 S. W. 1; Polk *v.* State, 40 Ark. 482, 48 Am. Rep. 17, in which it is said: "The legislature never intended to send a man to the penitentiary for having had illicit connection with a prostitute, or a woman of easy virtue, when she had consented, even under a promise of marriage."

[4] People *v.* Squires, 49 Mich. 487, 13 N. W. 828; State *v.* Bennett, 137 Iowa 427, 110 N. W. 150; State *v.* Carron, 18 Iowa 372, 87 Am. Dec. 401.

[5] State *v.* Turner, 82 S. C. 278, 17 Ann. Cas. 88; Ferguson *v.* State, 71 Miss. 809, 15 South. 66; Willhite *v.* State, 84 Ark. 67, 104 S. W. 531; Caldwell *v.* State, 73 Ark. 139, 83 S. W. 929, reversing Walton *v.* State, *supra.*

presenting any evidence whatsoever to show that the prosecutrix was in fact chaste, prior to her intercourse with the defendant.[6] Since none but chaste women may be seduced,[7] the prior chastity of the prosecutrix is always in issue,[8] but under this view of the burden of proof it is presumed that the prosecutrix was in fact chaste at the time of the alleged seduction by the defendant. The prosecution makes out in the first instance a complete prima facie case against the defendant by alleging, and supporting by evidence, those elements of the crime which are considered essential, e. g., the promise of marriage, the intercourse, etc.

Of course, in these jurisdictions, as everywhere, it is competent for the defendant to introduce evidence tending to show prior unchastity, but if he does not do so a conviction will be sustained;[9] and the burden of first adducing evidence is cast squarely upon him; prior unchastity being regarded as matter of defense coming more properly from the accused than from the prosecution.[10]

> "The last error we shall notice is, that the court erred in instructing the jury that the law presumes a woman to be chaste until the contrary is shown. We believe this instruction to be correct. The presumption of law should be in accordance with the general fact; and whenever it shall be

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[6] Arkansas: Willhite *v.* State, *supra;* Caldwell *v.* State, *supra,* reversing Walton *v.* State, *supra.*

Indian Territory: Kerr *v.* United States, 7 Ind. T. 486, 104 S. W. 809; Tedford *v.* United States, 7 Ind. T. 254, 104 S. W. 608.

Michigan: People *v.* Squires, *supra;* People *v.* Clark, 33 Mich. 112; People *v.* Brewer, 27 Mich. 134 (leading case).

Mississippi: Norton *v.* State, *supra;* Ferguson *v.* State, *supra.*

Texas: Curry *v.* State (1914 Tex. Cr. App.), 162 S. W. 85; Knight *v.* State, 64 Tex. Cr. Rep. 541, 144 S. W. 967; Bost *v.* State, 64 Tex. Cr. Rep. 477, 144 S. W. 596. The Texas cases, according to Bost *v.* State, rest upon the authority of Lagrone *v.* State, 12 Tex. App. 426, which was an information for criminal slander (imputation of want of chastity). The rule as laid down here has been assumed, with but little discussion, to cover the case of seduction.

[7] "A prostitute may be the subject of rape, but not of seduction." Smith, J., in West *v.* State, 1 Wis. 209.

[8] People *v.* Clark, *supra;* Wilson *v.* State, 73 Ala. 527; Knight *v.* State, *supra;* State *v.* Jones, *supra.*

[9] People *v.* Brewer, *supra.*

[10] People *v.* Clark, *supra.*

> true of any country, that the women, as a general fact, are not chaste, the foundations of civil society will be wholly broken up. Fortunately in our own country an unchaste female is comparatively a rare exception to the general rule; and whoever relies on the existence of the exception in a particular case, should be required to prove it." [11]

These words from the pen of Cooley, J., sufficiently set forth the view of these courts with regard to the burden of proof under this type of statute. It may be worthy of notice that, while in general the defendant is under the necessity of proving prior unchastity by a preponderance of the evidence,[12] yet in at least one jurisdiction it has been held that he need raise in the minds of the jury merely a reasonable doubt as to the prior chastity of the prosecutrix.[13]

An unchaste woman who has reformed may be seduced within the meaning of these statutes, but where the reformation took place a short time before the alleged seduction the burden is, in the first instance, cast upon the prosecution to prove reformation beyond a reasonable doubt.[14] In one case it was held that six months of continence was not such a period of reformation as to permit the prosecution to rest on the presumption of chastity.[15]

In at least two jurisdictions a statute is found which differs somewhat from the type previously discussed. The essential language is:

> "That any male person * * * who shall * * * seduce any unmarried woman shall * * *; and no conviction shall be had if, on the trial, it is proved that such woman was, at the time of the alleged offense, lewd and unchaste."

In these jurisdictions prior chastity is, in the first instance, presumed, and in the absence of evidence to the contrary a con-

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[11] People *v.* Brewer, *supra.*

[12] Willhite *v.* State, *supra.*

[13] Tedford *v.* United States, *supra.*

[14] People *v.* Squires, *supra;* Kerr *v.* United States, *supra.* See also to same effect State *v.* Bennett, 137 Iowa 427, 110 N. W. 150, which was decided under a statute containing the words, "of previously chaste character."

[15] People *v.* Squires, *supra.*

viction should be sustained.[16] But if, on the trial, the defendant should introduce evidence tending to show prior unchastity, the burden of proof (ultimate risk of non-persuasion) is on the prosecution to prove the guilt of the accused, and then,

> "a reasonable doubt as to the chastity of the woman is as fatal to a conviction as is the existence of such doubt in reference to any other material fact." [17]

II. Statutes Punishing Seduction of "Any Unmarried Woman of Previous Chaste Character."

The second great type of statutes reads (omitting, as before, matter immaterial to the present investigation):

> "Any * * * man who shall * * * seduce any unmarried female of previous chaste character * * * etc."

In the construction of statutes of this type the courts have, unfortunately, not been of unanimous opinion; nevertheless the great weight of authority and, it is believed, of reason, holds that the "previous chaste character" of the female is a material element of the case for the prosecution, as much so as the promise of marriage, or as a local requirement that the prosecutrix be under the age of twenty-one years. According to these courts the "previous chaste character" must be averred in the indictment, which is otherwise demurrable, and must, in the first instance, be supported by evidence before a *prima facie* case is made out against the defendant.[18]

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[16] Alabama: Munkers *v.* State, 87 Ala. 94, 6 South. 357; Wilson *v.* State, 73 Ala. 527.

South Carolina: State *v.* Turner, 82 S. C. 278, 17 Ann. Cas. 88.

[17] Smith *v.* State, 118 Ala. 117, 24 South. 55; Wilson *v.* State, *supra.*

[18] California: People *v.* Wallace, 109 Cal. 611, 42 Pac. 159; People *v.* Samonset, 97 Cal. 448, 32 Pac. 520; People *v.* Krusick, 93 Cal. 74, 28 Pac. 794.

New York: People *v.* Weinstock, 27 N. Y. Cr. Rep. 53, 140 N. Y. Supp. 453.

Oklahoma: Harvey *v.* Territory, 11 Okla. 156, 65 Pac. 837.

Oregon: State *v.* Meister, 60 Ore. 469, 120 Pac. 406.

Wisconsin: West *v.* State, 1 Wis. 209 (leading case).

See also the following cases where the crime was enticement for purposes of prostitution: People *v.* Roderigaz, 49 Cal. 9; Com. *v.* Whit-

These courts do not, of course, deny that a presumption of chastity exists as to women in general, but, since the *female sex* is not appearing as prosecutrix, they deny that any question of this presumption is involved in the issue to be tried. If the prosecutrix herself were on trial for any offense involving illicit sexual relations, the presumption of chastity would indeed come to her aid, but only for the reason that the prosecution would be compelled to prove its case beyond any reasonable doubt. But when, as in a trial for seduction, the prosecutrix appears in court averring her frailty, the presumption of chastity so universally accorded her sex is, as to her, displaced.

> "One act of illicit intercourse affords no presumption that another has not preceded it." [19]

It would seem that under the most charitable view that can be taken of the case there should be no presumption of prior chastity or unchastity, but rather that the prosecution should be compelled in the first instance to offer evidence that the prosecu-

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taker, 131 Mass. 224. *Contra,* for the same crime committed on a woman "of previous chaste life and conversation." People *v.* Bradshaw, 153 Ill. 156, 38 N. E. 652; People *v.* Slocum, 90 Ill. 274.

Contra:

Georgia: "Virtuous," etc., Woodward *v.* State, 5 Ga. App. 447, 63 S. E. 573; Wood *v.* State, 48 Ga. 193.

Iowa: State *v.* Drake, 128 Iowa 539, 105 N. W. 54—evidence upon which the jury might rely as "credible" must be introduced by the defendant. State *v.* Hemm, 82 Iowa 609, 48 N. W. 971—preponderance of evidence. State *v.* McClintic, 73 Iowa 663, 35 N. W. 696; State *v.* Andre, 5 Clark (Iowa) 389, 69 Am. Dec. 708. See, also, note 14, *supra.*

Virginia: Flick *v.* Com., 97 Va. 766, 34 S. E. 39; Mills *v.* Com., 93 Va. 815, 22 S. E. 863; Barker *v.* Com., 90 Va. 820, 20 S. E. 776. The Virginia decisions are unsatisfactory, in that no extended survey of the authorities is made. The court seems to have overlooked the fact that a distinction might well be taken between the two great types of statutes; the decisions seem to be based largely upon People *v.* Brewer, *supra,* and but four other cases are cited: People *v.* Clark, *supra;* Polk *v.* State, *supra;* State *v.* McClintic, *supra;* and Wilson *v.* State, *supra.* The Iowa case (State *v.* McClintic, *supra*) is the only one of the authorities which is strictly in point, since each of the others is based on a statute which does not contain the words, "of previous chaste character."

Washington: State *v.* Jones, 80 Wash. 588, 142 Pac. 35.

[19] Smith, J., in West *v.* State, *supra.*

trix was of previous chaste character, if that was actually the case.

It is difficult to see how this rule could be productive of injustice to any one. That there are unchaste women is undeniable; the very statute itself draws the distinction between the women who are chaste and those who are not. The words, "of previous chaste character," were surely not inserted in the statute for no purpose whatever; it would seem, on the contrary, that these words constitute a part of the definition of the crime, and are intended as a presentation of an essential element thereof, to be averred as such, and to be supported by proof beyond any reasonable doubt.

These courts further hold that, until the prosecution has so proven its case, the defendant must be presumed innocent of the offense with which he is charged, and that this presumption may not, in the absence of the express mandate of the Legislature, be overridden by any counter presumptions. More minutely expressed, the presumption of innocence means simply that every material element constituting the offense charged as crime must be laid and proven by the prosecuting power. Any relaxation of this salutary rule means that in the eyes of the jury an undue prejudice against the defendant is created from the very start, and in this consists the larger measure of justice which this construction of the seduction statutes metes out to the defendant. The accused may be guiltless of all offenses; he may, if the prosecutrix was previously unchaste, be guilty merely of the lesser crime of illicit intercourse, in the commission of which the prosecutrix is *in pari delicto;* again he may, indeed, be the "traitorous seducer" and alone guilty of the higher statutory crime. That is for the evidence of both parties to show. But it is to be borne in mind that:

> "all these presumptions are in the administration of criminal justice as aids to defense, and not as instruments of assault. They are the shield of the accused, not the sword of the prosecutor."

Some of the statutes differ slightly from those heretofore considered. In place of the words, "of previous chaste character," the phrase, "of good repute," is used.

The construction placed on these statutes is in the great majority of cases identical with the view just advanced. Prior chastity is not presumed, and both the burden of proof and the burden of evidence in the first instance are cast squarely upon the prosecution.[20]

Indeed, in many of these decisions, the opinions of the courts in the cases cited in notes 18 and 20 are approved, and in one case it is expressly declared that no distinction, as far as the burden of proof is concerned, can be taken between statutes using the words, "of previous chaste character," and those using "of good repute." [21]

Nor does this construction of the rule work any undue hardship upon the prosecuting power. Some evidence of prior chastity must, indeed, be introduced in chief, but the courts have been extremely liberal in this regard. In an early leading case it was stated that the fact that the prosecutrix's prior chastity had never been questioned would "perhaps" establish it for the purpose of enabling the State to make out a prima facie case.[22]

This suggestion was approved in several later cases,[23] and in a very recent one the prosecutrix's own testimony was held to be sufficient for that purpose.[24] In the nature of the case but slight *affirmative* evidence can be presented; the main object to be

[20] Missouri: State *v.* Thornton, 108 Mo. 640, 18 S. W. 841; State *v.* McClaskey, 104 Mo. 644, 16 S. W. 511; State *v.* Hill, 91 Mo. 423, 4 S. W. 121. New Jersey: Zabriskie *v.* State, 43 N. J. L. (14 Vroom) 640, 39 Am. Rep. 610 (leading case).

Pennsylvania: Oliver *v.* Commonwealth, 101 Pa. 215, 74 Am. Rep. 704.

[21] State *v.* Hill, *supra.*

[22] West *v.* State, *supra.*

[23] Oliver *v.* Commonwealth, *supra;* Zabriskie *v.* State, *supra;* State *v.* McCaskey, *supra;* State *v.* Hill, *supra.* Proof of reputation for chastity is not necessarily proof of chaste character, yet it is evidence of chaste character. Ex parte Vandiveer, 4 Col. App. 650, 88 Pac. 994. The most liberal application of this doctrine would seem to be expressed in People *v.* Roderigaz, *supra,* where it is said that evidence that the prosecutrix had lived at home with her parents, or guardian, was competent as tending to establish prior chastity. Much the same thought is expressed in People *v.* Slocum, *supra,* where it is said that the fact that prosecutrix was under eighteen years of age and lived at home, "fortified" the presumption of chastity (Illinois doctrine, *supra*). This liberality would appear to be excessive, since better evidence (general reputation) is to be had.

[24] State *v.* Meister, *supra.*

achieved is the placing of the ultimate risk of non-persuasion on the prosecution in order that the defendant be not unduly injured in the eyes of the jury. Lord Hale's remark anent the crime of rape is peculiarly applicable here:

> "The accusation is easily made, hard to be proved, and harder to be defended and disproved by the party accused, though he be ever so innocent."

Edwin N. Moore.

NEW YORK CITY.